IN THE

Supreme Court of the U. S.

October Term, 1898.

No. 139.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

DAVID JOY, ADMINISTRATOR OF THE ESTATE OF JOHN A. HERVEY, DECEASED, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

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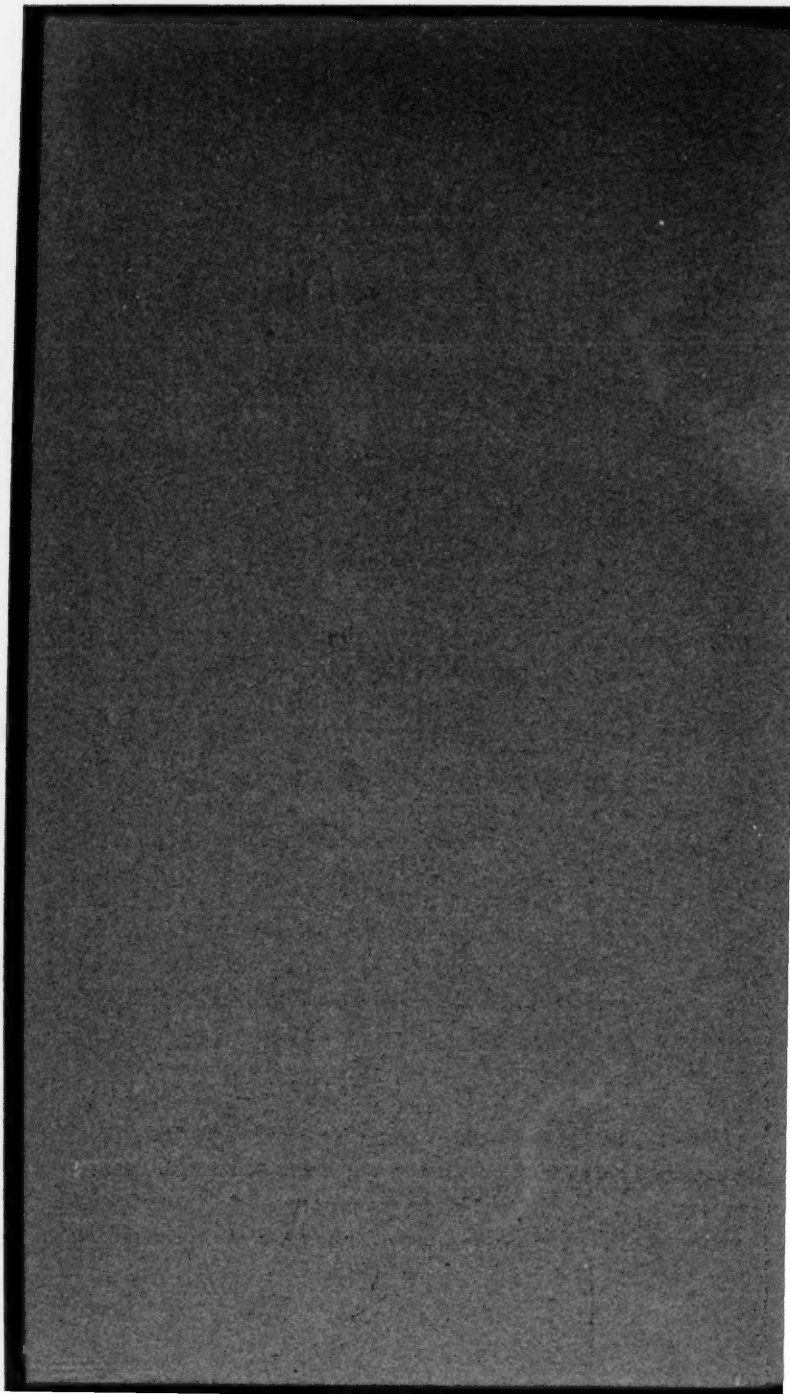

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BRIEF FOR PLAINTIFF IN ERROR.

In this case the Circuit Court of Appeals for the Sixth Circuit certifies a question of law for the decision of this Court. The Record consists only of the Certificate, which states in the briefest way the facts in the case and the statutes of the States of Indiana and Ohio and of the United States, on which the question arises, as follows:—

John A. Hervey, a citizen of Ohio, was on October 18, 1891, a passenger on a train of the Baltimore & Ohio Railroad Company, running between Chicago, Illinois, and Fostoria, Ohio, upon a ticket purchased at the former place. While upon said train, as a passen-

ger, he was injured in a collision caused by the negligence of the Baltimore & Ohio R. R. Co. at the town of Albion in the State of Indiana. On December 31, 1891, Hervey, then in life, filed his petition in the common pleas court of Hancock county, Ohio, against the Baltimore & Ohio R. R. to recover damages for the personal injuries caused in the collision above referred to. On January 23, 1892, the railroad company removed the case to the Circuit Court of the United States for the northern district of Ohio, on the ground of diverse citizenship. Pending the action and on October 23, 1892, Hervey died and the action was afterward, against the objection of the defendant company, revived in the name of Hervey's administrator appointed by the probate court of Hancock county, Ohio, the county of his residence.

By the law of Ohio in force at the time of the death of Hervey, the common-law rule as to abatement of causes of action for personal injuries prevailed. By section 5144 of the Revised Statutes of Ohio then in force, it was provided that:

"Except as otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance or against a justice of the peace for misconduct in office, which shall abate by the death of either party."

It has been held by the Supreme court of Ohio, that under this section a pending suit for personal injuries does not abate upon the death of the plantiff, but that the suit may be revived in the name of his personal representative. Ohio & Penns. Coal Co. *v.* Smith, adm'r, 53 Ohio State, 313.

By the law of Indiana, sec. 283 of the Revised Statutes of Indiana, it is provided that:

"A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action

is given for an injury causing the death of any person, and actions for seduction, false imprisonment and malicious prosecution."

Section 272 of the Revised Statutes of Indiana provides that:

"No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue."

Sec. 955 of the Revised Statutes of the United States provides:

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased paaty may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

Upon the foregoing statement this court respectively requests the instruction of the Supreme Court upon the following question:

Does an action pending in the Circuit Court of the United States sitting in Ohio brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?

ARGUMENT.

In the case of Stout vs. Indianapolis, &c., R. R. Co., 41 Indiana, 149, the Supreme Court of that State holds that under section 283 of the Revised Statutes of Indiana, above quoted, where the plaintiff in an action for personal injury dies pending the suit, the case cannot be proceeded with in the name of his administrator, and that the suit abates and cannot be revived.

Under the law of Ohio, too, the cause of action did not survive.

Counsel for the defendant in error based their contention below on Section 5144 of the Revised Statutes of Ohio.

"The question, therefore, is, in this case, not whether the right of action abated, but whether the pending action abated. Not whether the administrator could have brought the action after the death of Hervey in case he had not brought the action in person during his life, but whether Hervey having brought the action in person during his life, and died pending the action, the pending action could be revived in the name of the administrator. Of this proposition we submit there can be no doubt in Ohio."

"As that section stood at the time of the death of Hervey, certainly no right of action would have survived to his administrator. In other words, if Hervey had died before action was brought, the case would have been governed by Sec. 4975, and the right of action would have abated and no action could have been instituted by his administrator. But Hervey brought his action during life; it was a pending action at the time of his death, and, therefore, governed by the provisions of Sec. 5144, and did not abate, and was properly revived."

So that it is conceded that under the laws of Ohio as they stood at the time of Hervey's death, the cause of action did not survive, but the sole claim is that Hervey having commenced suit in his life-time, it did not abate by his death. And this may be so, especially under the recent decision of the Ohio Supreme Court in the case of the Ohio & Penna. Coal Co. vs. Smith, cited by counsel, although it does not appear whether this case arose under the original Sec. 4975 or after it was amended in 1893.

But does Sec. 5144 govern? Sec. 955 of the Rev. Stat. of the United States provides as follows:

"When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

This presents the question, does this section of the Rev. Stat. of the United States, govern, or does Sec. 5144 of the Rev. Stat. of Ohio?

Sec. 721 of the Rev. Stat. of the United States provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In the case at bar the statutes of the United States do otherwise provide. Therefore, Sec. 5144 has no application.

Sec. 2 of chapter 127 of the laws of West Virginia, provides as follows:

"If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract,"

Yet in the case of Martin's Administrator vs. Baltimore and Ohio Railroad Company, 151 U. S. 673, it was held in a case which was originally brought in the state court and afterwards removed to the Circuit Court of the United States, that Sec. 955 of the Revised Statutes of the United States governed and not this provision of the statute of West Virginia. The following is a part of the opinion in the case above referred to, commencing on page 691, and ending on page 693:

"By the Judiciary Act of September 24, 1789, c. 20, §31, (1 Stat. 90,) following the statute of 8 and 9 Will. 3, c. 11, §§6, 7, and since embodied as follows in the Revised Statutes, "when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute any such suit to final judgment," and upon *scire facias* judgment may

be rendered for or against him; and "if there are two or more plaintiffs or defendants, in a suit where the canse of action survives to the surviving plaintiff, or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated, but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." Rev. Stat. §§955; 956.

These statutes authorize the executor or administrator to prosecute or defend those cases only in which the cause of action survives by law, and do not undertake to define what those cases are.

The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question, not of procedure, but of right. As was said by Chief Justice Waite, speaking for this Court: "The personal representative of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. Stat. §955." "The right to proceed against the representatives of a deceased person, depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the State may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. Stat. §914. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of the action, not on the forms of proceeding to enforce it." Schreiber vs. Sharpless 110 U.S. 76, 80. In that case, the right in question being of an action for a penalty under a statue of the United States, the question whether it survived

was governed by the laws of the United States. But in the case at bar, the question whether the administrator has a right of action depends upon the law of West Virginia, where the action was brought and the administrator appointed. Rev. Stat. §721, Henshaw vs. Miller, 17 How. 212. The mode of bringing in the representative, if the cause of action survived, would also be governed by the law of the State, except so far as Congress has regulated the subject."

Assuming that the laws of the State govern as to the question of abatement, counsel contend that the laws of Ohio and not of Indiana control, and say, on page 7 of their brief, "The authorities are almost, if not quite universal that personal actions whether *ex contractu* or *ex delicto* are transitory and may be brought anywhere and are governed by the *lex fori*."

The principal case relied on by counsel is Buckles vs. Ellers, 37 American Reports, 156. But that case not only does not sustain the contention of counsel, but directly the contrary. On page 158 the Court uses this language:

"In Story on the Conflict of Laws, p. 369, §307 d, 13th edition, it is said: "In general where actions *ex delicto* are held transitory, and suits allowed to be maintained in a foreign forum, the right of action and the nature and extent of damages must be estimated according to the law of the place where the wrong was committed." To this proposition some rather confusing and unsatisfactory exceptions are noted by the learned author, but the exceptions do not overthrow the general rule as stated above by him.

And on page 159, this language: "Section 24 of our Code, 2 R. S. 1876, p. 43, confers upon every unmarried woman the right to prosecute an action for her own seduction; but under the construction given, and as we believe, correctly given as above stated to analogous statutes, that provision of the code has no extra territorial force, and does not authorize such an action to be main-

tained in this State for acts of seduction committed in another State."

The cases cited in brief of plaintiff in error show that the suit after its revivor proceeded precisely as if the administrator had brought the suit originally. We then have a suit by an administrator in an Ohio court for a tort committed in the State of Indiana.

But under the laws of Indiana that suit could not have been maintained. Hence under the reasoning of the court in the case cited and relied upon by counsel, the suit could not be maintained in Ohio.

See also case of Woodward vs. R. R. Co., 10 Ohio State Rep., 121.

But the contention is that the law of the forum governs. In this connection it must be remembered that the forum in this case is the Circuit Court of the United States, a court co-extensive with all of the States of the Union, including Indiana; and the fact that the United States is divided into circuits and districts for the convenience of administration, does not matter, because the law of the forum would still be the law of the United States.

Burrill defines *lex fori* to be "the law of the forum or court; the law of the place or State where a remedy is sought or an action is instituted."

Hence, in this case, the law of the United States. From which it seems to follow logically and conclusively that if the law of the forum is to govern, then Sec. 955 of the Rev. Stat. of the United States governs, and if that governs, it is conclusive upon the question presented, and there was no authority for reviving this action unless it appear that the cause of action survived, and it is conceded by counsel for defendant in error that the cause of action did not survive under either the laws of Ohio or the laws of Indiana.

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Of Counsel.